77-43

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RAY MELVIN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, Ray Melvin, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to reverse its decision affirming the judgment of the United States District Court for the Eastern District of Kentucky.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is as yet unreported, but is appended hereto.

JURISDICTIONAL STATEMENT

The opinion delivered by the United States Court of Appeals for the Sixth Circuit was entered on February 22, 1977 in *United States* v. *Ray Melvin*, No. 76-2192 and No. 76-2341, and is appended to this petition as appendix "a". The final judgment of conviction in the United States District Court for the Eastern District of Kentucky was entered on May 17, 1977 in *United States* v. *Ray Melvin*, Criminal Action 76-2.

Also attached as appendix "b" is a copy of the order denying petition for rehearing. A copy of the Stay of Mandate is appended hereto as appendix "c".

This petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Jurisdiction of the Court of first instance was under 18 U.S.C. §3231.

QUESTIONS PRESENTED

I. Whether the Court erred in holding that there was a sufficient nexus with interstate commerce to support a conviction under 18 U.S.C. §1951.

II. Whether the Court erred in holding that the District Court properly had jurisdiction over the person of the petitioner.

III. Whether the Court erred in holding that petitioner had not been deprived of his Sixth Amendment rights by the action of the Trial Court in:

(a) Arbitrarily limiting petitioner's character witnesses to three.

(b) Forbidding petitioner from using said character witnesses because of answers elicited by petitioner on cross-examination of government witnesses.

(c) Prohibiting petitioner from inquiring of additional government witnesses as to petitioner's character.

(d) Prohibiting petitioner from cross-examining a key government witness, Herbie Gene Wheeler, on prior inconsistent statements.

(e) Prohibiting petitioner's counsel from interrogating a co-defendant's witnesses.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title 18 U.S.C. §1951 provides in pertinent part:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do

anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

Petitioner is the former sheriff of Johnson County, Kentucky. On July 9, 1975 the Johnson County Grand Jury indicted petitioner on six counts of bribery and extortion. The indictments charged that on six different occasions petitioner extorted money from certain bootleggers who operated in Johnson County by demanding money in return for protection from arrest for violating the Kentucky statutes against selling alcohol in local option territory. Trial was held, but the jury was unable to agree on a verdict. The case was continued for re-trial at a later date.

On February 23, 1976 a federal grand jury sitting at Pikeville, Kentucky, returned an indictment charging petitioner with eleven counts of violating Title 18, Section 1951, United States Code (popularly known as the Hobbs Act).

This indictment charged the commission of the same acts of extortion against the same bootleggers on the same dates as did the state indictments.

Trial was held and the petitioner was found guilty on seven counts of the indictment. On May 17, 1976 appellant was sentenced to four years'

imprisonment and a fine of $7,500 on four counts, imprisonment to run concurrently, and five years' imprisonment and a $10,000 fine on three counts, said sentences and fines to be suspended and petitioner placed on probation for five years to begin on his release from custody.

REASONS FOR GRANTING THE WRIT

The fundamental questions in this case concern whether the required nexus between interstate commerce and the extortion of local bootleggers by a local sheriff is satisfied upon the mere showing that the beer sold by the bootleggers had previously travelled in interstate commerce. An additional question concerns whether the district court had jurisdiction over the person of the petitioner considering the actions of the state in placing him on trial for the same acts as charged in the federal indictment. Petitioner also questions the actions of the district court in limiting him to three character witnesses and then severely restricting him in the presentation of his case and the cross-examination of government witnesses.

I. THE COURT ERRED IN HOLDING THAT THERE WAS PROVEN A SUFFICIENT NEXUS WITH INTERSTATE COMMERCE TO SUPPORT A CONVICTION UNDER 18 U.S.C. §1951.

Ray Melvin stands convicted of extorting money from Johnson County, Kentucky, bootleggers by allegedly demanding money from them in return for protection from arrest for violating Kentucky's local option law.

Interference with interstate commerce is an essential element of the offense. *Stirone* v. *United States,* 361 U.S. 212 (1960). The only evidence offered by the United States to prove this essential element of the crime was the sale in Kentucky of certain brands of beer manufactured outside Kentucky. The government introduced evidence that the bootleggers sold these brands of beer by purchasing them in a "wet" Kentucky county and transporting them into a "dry" Kentucky county for re-sale. No other evidence was introduced on this element of the offense.

Petitioner asserts this was a failure to prove an essential element of the offense. Logically there must come a point in time when goods travelling in interstate commerce leave the stream of interstate commerce and come to rest. *Robbins* v. *Shelby County Taxing District,* 120 U.S. 497 (1887). Petitioner asserts these goods left the stream of

interstate commerce when they came to rest in the "wet" Kentucky county.

Kentucky Revised Statute 242.260 (hereinafter KRS) makes it "unlawful for any person . . . to bring into, transfer to another, deliver or distribute in any local option territory any alcoholic beverage . . . ."

KRS 244.180 classifies as contraband "Any alcoholic beverages in the possession of anyone not entitled by law to possess them." As contraband the beer sold by these Johnson County bootleggers was not commerce which Congress may regulate under the Commerce Clause of the United States Constitution.

In the case of *Ziffrin* v. *Reeves*, 308 U.S. 132 (1939), this Honorable Court stated:

> The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. . . . Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less . . . The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce. *Sligh* v. *Kirkwood*, 237 U.S. 52, 59; *Clason* v. *Indiana*, 306 U.S. 439 (1939).

In *Sligh*, *supra*, the Court found that immature or otherwise diseased oranges had been declared contraband by Florida, and thus were not articles in interstate commerce for the purpose of exportation from Florida. A similar situation involving dead animals existed in *Clason*, *supra*.

In *United States* v. *Pacente*, 503 F.2d 543 (7th Cir. 1974), the Circuit Court of Appeals for the Seventh Circuit upheld the conviction of a policeman who attempted to extort money from a Chicago tavern owner under threat of arrest for violation of the state liquor laws. A major distinction between the facts of *Pacente* and the facts of the case at bar is readily apparent. In *Pacente* a legitimate businessman was being victimized. Such was the case in every other decision petitioner had read concerning the Hobbs Act. In the case at bar local bootleggers are involved. Petitioner submits that extortion of even a bootlegger is a crime, but if so, is a violation of Kentucky, not federal, law. This case is not at all similar to those in which a policeman is extorting money from a business which could legally sell alcoholic beverages.

In *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976), the Sixth Circuit Court of Appeals refused to extend the Hobbs Act to the armed robbery of a department store. The prosecution had proceeded on the theory that since the department store sold articles that had been shipped in interstate commerce, and, moreover, the funds stolen from the store affected the store's ability to purchase more goods shipped in interstate commerce, that sufficient impact upon interstate commerce had been shown to uphold federal jurisdiction. The Court in rejecting the government's position said:

> This interpretation and application of §1951, as urged by the government, would encompass literally any armed robbery occurring in any state. Accordingly, under the de minimus interstate commerce rule, the robbery of a corner grocery store, pharmacy or gasoline station, without more, would be a federal offense. . . . If the time ever comes when the Congress decides to expand federal criminal jurisdiction to include all armed robberies having any effect on interstate commerce, no matter how small, more specific language than the broad general provisions of the Hobbs Act will be necessary.

Petitioner contends that Congress never intended the Hobbs Act to be used in such prosecutions. Bootlegging is a state offense and the

federal government is excluded therefrom by the Twenty-first Amendment. Extortion by a local law enforcement official of a local bootlegger is logically also a state crime.

In *United States* v. *Bass*, 404 U.S. 336, 349 (1971), this Court held that:

> Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

In accord is the later case of *United States* v. *Enmons*, 410 U.S. 396, 411 (1973), in which the Court reiterated that a criminal statute "must be strictly construed, and any ambiguity must be resolved in favor of lenity." This Court also held precisely that neither the language of the Hobbs Act, nor its legislative history, justify the conclusion that Congress intended to work "an unprecedented incursion into the criminal jurisdiction of the States."

This type of prosecution does significantly alter the state-federal criminal jurisdiction relationship. Absent the clear intention of Congress to extend federal jurisdiction into this area, petitioner prays that the question at issue be resolved in favor of traditional state jurisdiction in conformity with the distinctions drawn in *Bass*.

II. THE COURT ERRED IN HOLDING THAT THE DISTRICT COURT PROPERLY HAD JURISDICTION OVER THE PERSON OF THE PETITIONER.

Prior to the federal indictment Ray Melvin had been indicted by the Commonwealth of Kentucky on charges of extortion and bribery. Trial was held in the Johnson Circuit Court which resulted in a "hung jury" on September 18, 1975. It was not until February 23, 1976 that petitioner was indicted by the federal grand jury on charges stemming from the same acts of extortion against the same bootleggers on the same dates as charged in the state indictments.

In the case of *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922), this Court resolved a similar problem on the basis of comity. In that case the Court held that the state had assumed exclusive jurisdiction and that the federal government could obtain jurisdiction only by obtaining a waiver from the state. There has been no waiver by the Commonwealth of Kentucky.

Petitioner further asserts the United States Attorney for the Eastern District of Kentucky violated the policy laid down by the Attorney General on April 6, 1959, commonly known as the "Petite Policy." See *Petite* v. *United States*, 361 U.S. 529 (1960). The "Petite Policy" prohibits a federal trial for the same act or acts as has been previously tried in a state court unless there are compelling federal interests involved, and then only after the prior authorization by the appropriate Assistant Attorney General.

In the case of *Watts* v. *United States*, 422 U.S. 1032 (1975), this Court sanctioned a reversal and dismissed such a charge because the Department of Justice violated the "Petite Policy," See *Ackerson* v. *United States*, 419 U.S. 1099 (1975), and *Hayles* v. *United States*, 419 U.S. 892 (1974).

In the case at bar the state initiated its prosecution first. As there is no compelling federal interest in protecting bootleggers from extortion by a local sheriff, the policy is applicable. Hence, the policy should be applied, and this judgment reversed and remanded with instructions to dismiss.

III. THE COURT ERRED IN HOLDING THAT PETITIONER HAD NOT BEEN DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS BY THE ACTION OF THE TRIAL COURT IN:

(a) Arbitrarily limiting petitioner's character witnesses to three.

(b) Forbidding petitioner from using said character witnesses because of answers elicited by petitioner on cross-examination of government witnesses.

(c) Prohibiting petitioner from inquiring of additional government witnesses as to petitioner's character.

(d) Prohibiting petitioner from cross-examining a key government witness, Herbie Gene Wheeler, on prior inconsistent statements.

(e) Prohibiting petitioner's counsel from interrogating a co-defendant's witnesses.

Petitioner was limited to three character witnesses. Petitioner asserts the trial judge abused his discretion in so limiting the petitioner, and later ruling that petitioner had presented three such witnesses when he questioned three witnesses for the prosecution concerning petitioner's character. The harshness of numerical limitation was recognized in *Peterson* v. *United States*, 268 F.2d 87, 88 (10th Cir. 1959).

It has long been recognized that "a defendant may offer his good character to evidence the improbability of his doing the act charged." 1 Wigmore, Evidence, 3d Ed. §56, p. 450. This Court stated in *Michelson* v. *United States*, 335 U.S. 469, 476 (1948), "character is relevant in resolving probabilities of guilt."

Upon attempting to question a fourth government witness about the petitioner's character, the trial judge, in sustaining the government's objection, informed the petitioner that his three character witnesses had been "used up." This was true even though it took the government another two or three days to complete its case.

Petitioner contends that his character is a vital element in his defense. The government witnesses testified as to his character stating it was good. Good character as Professor Wigmore, *supra*, has so clearly pointed out is evidence of the improbability of committing a crime. A man of good character is not likely to have committed crimes such as charged in the indictment. In a case such as this where even the trial judge was willing to admit that the nature of the crime placed the petitioner's character in issue it was error for the Court to arbitrarily limit petitioner to three character witnesses, and then rule they had been "used up" after three government witnesses had been asked about petitioner's character.

Petitioner would agree that ordinarily the Court may in the exercise of its discretion limit the number of witnesses permitted to testify concerning character, but contends that under the facts and circumstances surrounding the case at bar such limitation as imposed here constitutes abuse of discretion in such a degree as to have deprived petitioner of a fair trial.

Petitioner was prohibited from cross-examining a chief government witness concerning prior contradictory statements on the ground that petitioner's counsel had acted as counsel for the witness in state proceedings. Such was not the case, but the trial judge refused to permit the cross-examination on the ground it violated the attorney-client privilege. There was no attorney-client relationship between the petitioner's counsel and the witness, and even if there had been there would have been no privilege because a third-party not connected in any manner with the state proceedings was present thus destroying the confidentiality.

In *Alford* v. *United States*, 282 U.S. 687 (1931), the Court stated:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . .

In *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966), this Court re-affirmed *Alford* by stating, "[A] denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

It is a fundamental rule ". . . that a witness may be severely cross-examined in an effort to determine whether he is telling the truth." *United States* v. *Sweeney*, 262 F. 2d 272, 276 (3rd Cir. 1959). "'Great latitude in cross-examination should be allowed." *Fisher* v. *United States*, 231 F. 2d 99, 105 (9th Cir. 1956). The defendant in a criminal case is ". . . entitled to full and complete cross-examination of the government's witnesses . . . ." *Gardner* v. *United States*, 283 F. 2d 580 (10th Cir. 1960).

By refusing to permit the petitioner to cross-examine a key government witness against him

concerning prior inconsistent statements, the trial court deprived petitioner of a fair trial. The limitation placed upon cross-examination deprived petitioner of the latitude spoken of by this Court in *Alford, supra.* Petitioner was unable to ". . . place the witness in his proper setting and put the weight of his testimony and his credibility to a test . . . ." Such limitation was a substantial burden on petitioner's ability to defend himself and should constitute reversible error.

Petitioner also contends it was error to refuse petitioner the right to question a co-defendant's witnesses upon the ground that petitioner had already announced closed. Petitioner elected to close his case because of the Court's ruling concerning the use of character witnesses. Petitioner felt then and asserts now it was error on the part of the trial court to limit him to three character witnesses. The Court's ruling effectively forced petitioner's witnesses from the stand as did the Judge in *Webb* v. *Texas,* 409 U.S. 95 (1972). Taken all together this was a deprivation of a fair trial and due process which left petitioner in the position of being unable to present any defense at all.

In refusing to permit the petitioner to call his own character witnesses, in refusing to permit petitioner to cross-examine a chief government witness on prior inconsistent statements, and in depriving petitioner of the right to examine the

witnesses of a co-defendant, the trial court deprived petitioner of his "right to present a defense." The Sixth Amendment guarantees to the accused the right to be "confronted" with opposing witnesses and to the "Assistance of Counsel." *Herring* v. *New York,* 422 U.S. 853, 857 (1975). This Court went on to state:

> The decisions of this Court have not given to these constitutional provisions a narrowing literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.

The right to present evidence is fundamentally guaranteed an accused person by the Sixth Amendment. *Washington* v. *Texas,* 338 U.S. 14 (1967). The rulings of the trial court in essence prevented petitioner from presenting evidence in his own behalf and deprived petitioner of assistance of counsel. As a result petitioner was deprived of a fair trial.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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(606) 437-6218

Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to U.S. Sup. Ct. Rule 33(3), I hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari were this day mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, and also to the Hon. Eldon Webb, United States Attorney for the Eastern District of Kentucky, P.O. Box 1490, Lexington, Ky. 40501, Attorney for Respondent, this 5th day of July, 1977.

Dan Jack Combs

DAN JACK COMBS
Attorney for Petitioner

APPENDIX

APPENDIX A

No. 76-2192
No. 76-2341

Filed
Feb 22 1977
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

RAY MELVIN,)

Defendant-Appellent.)

ORDER

Before PHILLIPS, Chief Judge and WEICK and EDWARDS, Circuit Judges.

Melvin first was indicted in State court. His State court trial resulted in a hung jury and has not yet been retried. Subsequent to the State court trial, Melvin was indicted under the Hobbs Act and found guilty by a jury in District Court of selling protection tc selected bootleggers in exchange for

monthly fees, and of raiding and closing down bootleggers who refused to pay for protection.

Specifically, the jury found Melvin not guilty on the first four counts of the indictment and guilty on counts five through eleven. Melvin was sentenced to four years imprisonment and a $7,500 fine on each of counts five through eight, the imprisonment to run concurrently. He was sentenced to five years' imprisonment and a $10,000 fine on each of counts nine through eleven, said sentences and fines to be suspended and Melvin placed on probation for five years, to begin upon his release from custody.

Melvin presents the following grounds for reversal: (1) There was not sufficient nexus with interstate commerce to support a conviction under 18 U.S.C. § 1951; (2) the trial court lacked both subject matter and personal jurisdiction; (3) prosecution of this action subjected appellant to double jeopardy in violation of the fifth amendment to the United States Constitution; (4) the action should have been dismissed on the basis of comity; (5) the recordings of conversations electronically intercepted and reproduced should have been suppressed at trial; and (6) limitations placed upon appellant's questioning prosecution witnesses regarding his character violated his constitutional right to a fair trial.

Upon consideration, the court concludes that all of these assignments of error are without merit.

Accordingly, it is ORDERED that the judgment of conviction be and hereby is affirmed.

Entered by order of the court.

/s/ John P. Hehman
CLERK

* * * * * * *

APPENDIX B

FILED
MAY 20 1977
JOHN P. HEHMAN, Clerk
Nos. 76-2192 & 76-2341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
RAY MELVIN,)
Defendant-Appellant.)

ORDER DENYING PETITION
FOR REHEARING

Before PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

No judge of the court having moved for rehearing en banc, the petition has been assigned to the hearing panel.

Upon consideration, it is ORDERED that the petition for rehearing be denied.

Entered by order of the court.

/s/ John P. Hehman
CLERK

* * * * * * *

APPENDIX C

FILED
JUN 7 1977
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 76-2192 & 76-2341

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAY MELVIN,
Defendant-Appellant.

BEFORE: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari

petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
John P. Hehman, Clerk

* * * * * * *